No. 86-1059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Rules 11, 26(g), and 37(c) of the Federal Rules of Civil Procedure, as amended in 1983, provide that sanctions "shall" be imposed when those rules have been violated. The questions presented are:

(a) When the record establishes that Rules 11, 26(g), and 37(c) have in fact been violated, does the district court have discretion to refuse to impose any sanction at all?

(b) If sanctions are mandatory when violations have been established, does the court have discretion to determine that "no sanction" is "the appropriate sanction" to be imposed?

(c) If sanctions are not mandatory, does the court abuse its discretion, as a matter of law, by refusing to impose sanctions when the record establishes that throughout the proceedings the facts, the

law, the evidence, and even the contents of the record itself were misrepresented to the court?

2.

In the district court Petitioner also moved for sanctions under 28 U.S.C. § 1927 (for unreasonable and vexatious multiplication and proliferation of the proceedings) and under Local Rule C-10 (N.D. Miss., 1983) for refusing to stipulate for purposes of the pretrial order facts that were not in good faith disputed). The motion was denied and Petitioner appealed.

(a) Was it error for the court of appeals to refuse to review Petitioner's contentions with respect to violations of § 1927 and Local Rule C-10 because it appeared to the appellate court that the district court had denied Petitioner's motion for sanctions without addressing those contions?

(b) Having refused to consider Petition-

er's contentions with respect to violations of § 1927 and Local Rule C-10, was it error for the court of appeals to enter judgment affirming the district court's denial of sanctions under those provisions?

PARTIES BELOW

All parties below are listed in the caption of this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Mildred B. Bell respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion entered by the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, affirming the district court's Order denying

Petitioner's motion for sanctions was not reported. It appears in the Appendix to this petition, beginning at page A.1, infra. The Order of the court of appeals denying a timely petition for rehearing en banc appears at page A.18.

The district court's Order denying petitioner's post-judgment motion for sanctions, also unreported, is set forth in the Appendix, beginning at page A.14.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1986 [A.16]. A timely petition for en banc rehearing was filed on September 30, 1986, and was denied on October 17, 1986 [A.18].

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 1927 of the Judicial Code, 28 U.S.C. § 1927 (as amended Sept. 12, 1980, Pub. L. 96-349, § 3, 94 Stat. 1156),

provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Rule 11 of the Federal Rules of Civil Procedure (as amended Apr. 28, 1983, eff. Aug. 1, 1983) provides, in pertinent part, as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties

> the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 26(g), Fed. R. Civ. Proc. (as amended Apr. 28, 1983, eff. Aug. 1, 1983), provides in pertinent part as follows:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .
>
> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or ob-

jection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 37(c), Fed. R. Civ. Proc. (as amended Mar. 30, 1970, eff. July 1, 1970), provides as follows:

> If a party fails to admit . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the . . . truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Local Rule C-10 (N.D. Miss., 1983 provides as follows:

> (b) To the end that the court's business may be facilitated, delay avoided, and the expense of litigation held to a minimum, it shall be the absolute duty of counsel for

all parties:

(1) to resolve by stipulations, to be included in the pre-trial order or equivalent document in each case, all relevant facts which are not in good faith controverted.

* * * * *

The failure of counsel to fulfill the above obligation will be regarded as a serious violation of this rule, and may result in the imposition of appropriate sanctions against the responsible attorney, or his client, or both.

STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Mississippi as an action to domesticate and enforce a 1974 Georgia judgment. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Georgia and the defendant a citizen of Mississippi.

The Complaint, filed by Petitioner in April 1985, alleged that Respondent had refused to make payments required by the

Georgia judgment. [Record, p. 2 (R. 2)].

Respondent's Answer admitted the jurisdictional facts (by failing to deny), admitted that a duly authenticated copy of the Georgia judgment was attached to the Complaint, and admitted that the Georgia judgment was a final judgment. Nevertheless, lack of jurisdiction and failure to state a claim were the only defenses asserted, except that the Answer denied that Respondent was in arrears (without asserting any affirmative defense to Petitioner's allegation of arrearages). [R. 11-13].

Shortly thereafter, Petitioner filed a motion for judgment on the pleadings (to domesticate the Georgia judgment) and a motion for a post-domestication show cause order. The show cause motion was supported by Petitioner's affidavit setting out in detail the arrearages that formed the basis of her Complaint.

Respondent did not file a counteraffidavit with respect to Petitioner's affidavit of arrearages. However, although he had admitted in his Answer that the Georgia judgment is a final one, Respondent opposed Petitioner's motions by asserting that the Georgia judgment is not a final judgment, and he cited numerous cases which he claimed supported the propositions of law asserted in his Response. [1st Suppl. Record, pp. 102-107]. Petitioner's Reply in support of her motions pointed out that the cases cited by Respondent in fact directly contradict the propositions for which they were cited,[1] and

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[1]For example, Respondent attached to his Response a copy of a 1977 Georgia statute and stated, "The court will note that the divorce in the case at bar was granted in 1974, but the [1977] statuts is applicable to that divorce." As authority for that proposition he cited Summerlin v. Summerlin, 274 S.E.2d 523 (Ga. 1981). [1st Suppl. R., pp. 105-106]. What the Georgia Supreme Court actually said in Summerlin was, "[T]he applicable modification statute is that statute in effect at the time of the divorce." [Emphasis added]. 274

noted that the Response appeared to have been certified in violation of Rule 11.

The district court denied Petitioner's motions for judgment on the pleadings and for a show cause order on the ground that, in the court's view, the Georgia judgment could not be domesticated until arrearages had been established. The district court stated that since matters outside the pleadings (i.e., the affidavit of arrearages which Petitioner had submitted in sup-

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S.E.2d at 524.

As another example, Respondent informed the court that "awards of child support and alimony have been and may be retrospectively modified in Georgia," citing as authority Skinner v. Skinner, 314 S.E.2d 897 (Ga. 1984). [1st Suppl. R., p. 106]. What the Skinner court in fact said was, "An order modifying an alimony-child support award can operate only prospectively, i.e., it is not to be given retroactive application." 314 S.E.2d at 899.

In the court of appeals, Respondent argued that these (and other misrepresented cases) were not misrepresentations; they were, he asserted, merely differences of opinion with respect to legal theory. [Respondent's "Brief of the Appellee," pp. 7-8, 13].

port of the motion for show cause order) could not be considered in conjunction with the motion for judgment on the pleadings, both the motion for judgment on the pleadings and the motion for a post-domestication show cause order were being denied. [R. 26-28].

Petitioner subsequently filed a motion for summary judgment. Respondent opposed that motion, asserting that summary judgment would be improper because the case contained such complex issues of law and fact. [1st Suppl. Record 155-158]. The motion was denied. [R. 78-79].

Following a bench trial in January 1986, judgment was entered on February 24, 1986, domesticating the Georgia judgment and determining Respondent's arrearages thereunder.

After judgment was entered in her favor, Petitioner filed a post-judgment motion

for sanctions in which she sought to have sanctions imposed upon Respondent and his attorney under Rules 11, 26(g), and 37(c) of the Federal Rules of Civil Procedure; under Local Rule C-10 (N.D. Miss., 1983); and under 28 U.S.C. § 1927.

As grounds for her motion Petitioner asserted, inter alia, (1) that Respondent's discovery responses violated Rule 37(c) on their face in that he refused to admit relevant matters when requested to do so, stating only that he lacked knowledge, that he lacked personal knowledge, or that petitioner already knew the answer; (2) that Respondent's attorney had certified discovery responses in violation of Rule 26(g); (3) that papers containing frivolous defenses, contentions, and arguments, as well as misrepresentations of law and fact, had been certified in violation of Rule 11; (4) that Respondent had violated

Local Rule C-10 (N.D. Miss., 1983) by refusing to admit for purposes of the pretrial order relevant matters which were not in good faith controverted; and (5) that Respondent's attorney had violated 28 U.S.C. § 1927 by unreasonably and vexatiously multiplying and proliferating the proceedings. [R. 92-96].

Copies of Respondent's discovery responses were attached as Exhibits to the motion [R. 97-115], and the motion itself referred to specific portions of the record which Petitioner contended established the violations of which she complained and therefore made the imposition of sanctions mandatory.

The district court did not issue a memorandum opinion but denied Petitioner's motion by entering the following Order [A.14, infra]:

> After reviewing the plaintiff's post-judgment motion for sanctions, the defendant's response thereto,

> and the plaintiff's reply, the court is of the opinion that while each party herein is far from being a model litigant, the award of sanctions is not appropriate for either party. The court finds that the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules.
>
> Accordingly, it is Ordered that the plaintiff's motion for sanctions and the defendant's motion for sanctions should be and are hereby denied.[2]

Petitioner appealed, contending that the record establishes unequivocally that

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[2]Defendant did not file a motion for sanctions; the district court apparently treated his Response to Petitioner's motion as a motion itself. The Response was replete with misrepresentations of fact, of law, and of the record itself, and provided an incredible example of deliberate false certification under Rule 11. See Petitioner's "Reply in Support of Motion for Sanctions," (R. pp. 136-145).

The district court stated that it had reviewed both Defendant's Response and Petitioner's Reply thereto. Nevertheless, the court of appeals refused to consider Petitioner's contention on that point, stating "[W]e are uncertain whether the district court considered this asserted violation when denying sanctions. Accordingly, we decline to consider it in reviewing the denial of sanctions." [A.4-5, infra, at n.1].

Rules 11, 26(g), and 37(c) were violated; that the district court therefore did not have discretion to refuse to impose sanctions; that even if the amended Rules did vest the district courts with such discretion, refusal to impose sanctions on the facts of this case would constitute an abuse of that discretion; and that the district court abused the discretion it has under 28 U.S.C. § 1927 and Local Rule C-10 (N.D. Miss.) by refusing to impose sanctions under those provisions.

On September 17, 1986, judgment was entered by the Fifth Circuit, affirming the lower court's Order denying sanctions. The court of appeals stated, in pertinent part, as follows:

> We understand the district court to have concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction. We are not constrained to say that the district court must, upon the establishment of a violation of the rules at issue

> here, impose some sort of sanction however nominal. . . . [P]laintiff has failed to show any abuse of discretion in the district court's conclusion that no sanction was the appropriate sanction. [A.11].

The court of appeals declined to review Petitioner's contention that the district court abused its discretion by refusing to impose sanctions under 28 U.S.C. § 1927 and Local Rule C-10 (N.D. Miss.):

> Plaintiff also contends that sanctions should be imposed under N.D. Miss. Rule C-10 and 28 U.S.C. § 1927. Apparently, the district court did not address these contentions. See supra at p. 2 [sic] of district court order denying sanctions.[3] Accordingly, we decline to review them. [A.6 at n.2].

Nevertheless, without remanding, the court affirmed the district court's denial of sanctions under those provisions.

A timely petition for en banc rehearing was denied by the Fifth Circuit on October 17, 1986. [A.18].

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[3]Since the district court's order contained only one page, the reference to page 2 of the district court order appears to be a clerical error.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION THAT SANCTIONS ARE NOT MANDATORY WHEN RULES 11, 26(g), AND 37(c) HAVE BEEN VIOLATED IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND, SIXTH, AND D.C. CIRCUITS.

The Fifth Circuit decided in this case that the Federal Rules of Civil Procedure do not require the district courts to impose any sanction when Rules 11, 26(g), and 37(c) have been violated.

Although the court's Opinion states that the decision is based upon well-settled principles of law, Petitioner has found no reported cases in which either the Fifth Circuit or any other federal appellate court has so ruled, and the Opinion does not refer to any.

The decision is contrary to the language of the Rules themselves, and it is contrary to both the 1970 Advisory Committee Notes regarding Rule 37(c) and the 1983 Notes re-

garding Rules 11 and 26(g). Furthermore, the decision is in direct conflict with the decisions of all other courts of appeals that have ruled upon the question, and conflicts in principle with the views expressed by Circuits which have not yet had occasion to rule upon the question.

A. Rule 11 and Rule 26(g) provide that if papers are certified in violation of those rules the court "shall" impose an appropriate sanction.

Rule 11 and Rule 26(g) vest the district courts with discretion to fashion "an appropriate sanction" when the rules have been violated, but both rules specifically provide that an appropriate sanction shall be imposed.

The Advisory Committee's Notes to the 1983 Amendment of Rule 11 point out that Rule 11 now imposes upon attorneys an affirmative duty to inquire into both the facts and the law before certifying pleadings and other papers. The Committee Notes

also state that the text of amended Rule 11 "seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked." [Emphasis added]. 1983 Advisory Committee Note, Rule 11.

With respect to the 1983 Amendment of Rule 26, the Committee Notes emphasize that the new rule requires judges to exercise their authority to impose sanctions on attorneys who abuse the discovery rules. "The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g)." 1983 Advisory Committee Note, Rule 26(g).

Most cases that have reached the appellate courts under the Amended Rules have arrived there for review of lower court orders imposing sanctions, and the appellate courts therefore have had to deter-

mine whether the district court erred in its conclusion that the rule had been violated, or whether it abused its discretion in determining that a particular sanction was an appropriate sanction in the circumstances. E.g., Hale v. Harney, 786 F.2d 688 (5th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

The Second, Sixth, and District of Columbia Circuits have, however, reviewed cases in which the district court (as in the present case) denied sanctions even though the record established that Rule 11's certification requirement had been violated. All three Circuits held that once a violation is established Rule 11 mandates that sanctions be imposed. Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985); Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985).

The Ninth Circuit has not yet ruled upon a case in which sanctions were denied even though violations had been established, but in several well-reasoned opinions that court has stated that it too considers sanctions to be mandatory. Unioil, Inc. v. E.F. Hutton & Co., 802 F.2d 1080 (9th Cir. 1986); Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

Furthermore, the Seventh Circuit, without specifically addressing the question of whether Rule 11 mandates such a result, has served notice on attorneys practicing in the Seventh Circuit that sanctions will be imposed when the requirements of Rule 11 are violated. See Dreis & Krump Manufacturing Co. v. International Association of Machinists & Aerospace Workers, District No. 8, 802 F.2d 247 (7th Cir. 1986).

B. Rule 37(c) specifies the sanction that must be imposed when a party has unjustifiably refused to admit as requested under Rule 36.

Rule 37(c) is intended to provide post-trial relief when a party has improperly refused to admit when requested to do so under Rule 36. All failures to admit (without good cause) are within its scope. 1970 Advisory Committee Notes, Rule 37(c).

Rule 37(c) does not vest the district courts with discretion to fashion an appropriate sanction when that rule has been violated; the rule itself specifies the very sanction that shall be imposed, i.e., costs incurred as the result of an unjustifiable failure to admit.

C. The decision below cannot be reconciled with the decisions from other Circuits merely by saying that "no sanction" may be "the appropriate sanction" to impose for Rule violations.

The Fifth Circuit's conclusion that a denial of sanctions may be the appropriate sanction to impose upon a party who has violated the Rules is a contradiction in

terms when applied to Rule 11 and Rule 26(g), and it cannot even arguably support a denial of sanctions under Rule 37(c), since that Rule does not vest the court with any discretion regarding the sanction to be imposed.

The Fifth Circuit itself noted that the mandatory language of Rules 11, 26(g), and 37(c) "certainly suggests" that the district courts do not have discretion to decide whether sanctions will be imposed when the rules have been violated. [A.6-7, infra]. The court quoted language from cases and other authorities directly supporting the proposition that sanctions are mandatory [A.6-10, infra, text & nn. 3,6], and then indicated its disagreement with those authorities by stating: "We are not constrained to say that the district court must, upon the establishment of a violation of the rules at issue here, impose some sort of sanction however nominal." [A.11-12].

No other appellate court has ruled that sanctions are not mandatory when Rules 11, 26(g), and 37(c) have been violated, and no other appellate court has even suggested that the duty imposed upon the courts by those Rules can be properly discharged by imposing a nominal sanction. Moreover, imposition of a nominal sanction clearly would be inappropriate where, as here, the record establishes that the Rules were not merely violated, but were instead flouted.

It cannot be assumed that the decision below reflects the views of only the reviewing panel and therefore will have little or no effect upon decisions in other cases; it is well settled in the Fifth Circuit that the panel's decision (i.e., that district courts have discretion to refuse to impose sanctions even though violations have been established) will have to be followed by other Fifth Circuit panels. See, e.g., United States v. Alfrey, 620 F.2d

551 (5th Cir.), cert. denied, 449 U.S. 938 (1980); Puckett v. Commissioner, 522 F.2d 1385 (5th Cir. 1975).

If not resolved by this court, the split in the Circuits created by the decision below will seriously impair the effectiveness of the 1983 Amendments in minimizing abuse of the judicial process. Furthermore, since sanctions serve the dual purposes of punishment and deterrence, a conflict among the Circuits on the question of whether sanctions are mandatory should not be permitted to stand.

II.

THE DECISION BELOW THAT SANCTIONS ARE NOT MANDATORY WHEN RULE VIOLATIONS HAVE BEEN ESTABLISHED RAISES A SIGNIFICANT PROBLEM CONCERNING THE STANDARD OF REVIEW IN SUCH CASES.

The motion for sanctions filed by Petitioner in the district court was prompted by what was, in Petitioner's view, an egregious abuse of the judicial process throughout the proceedings. The allegations in

Petitioner's motion were in every instance supported by references to the record establishing that the conduct Petitioner complained of had in fact been engaged in.

The district court summarily denied the motion for sanctions without any explanation except that, in the court's view, the conduct "did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules." [Emphasis added]. [A.14]. This, according to the court of appeals, meant that "the district court . . . concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction." [A.11]. Thus, both courts below indicated that in some unspecified circumstances conduct which is expressly forbidden by the Federal Rules may be engaged in with impunity.[4]

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[4]It is highly unlikely that a decision of this kind will go unnoticed by the practicing bar, espe-

The Fifth Circuit, like the district court, did not address any of the basic issues raised by Petitioner's specific allegations of misconduct, and the appellate court's Opinion did not offer even a clue as to how the appellate court determined that the district court did not abuse its discretion.

If the district courts are not required to apply the criteria specified in the Rules (e.g., good-faith belief and reasonable inquiry) in determining whether sanctions are to be imposed, what criteria are they permitted to use? And if, as here, the district courts need not enunciate the criteria they in fact apply, how can the appellate courts determine whether there has been an abuse of discretion?

What criteria did the courts below ap-

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cially in light of the Fifth Circuit's rule that all panels must follow rules of law laid down by prior Fifth Circuit panels. See supra, pp. 23-24.

ply in the instant case? What circumstances could justify a refusal to impose sanctions for repeatedly making flagrant misrepresentations of law and fact to the court? What circumstances could justify a refusal to impose sanctions for filing patently frivolous defenses?

In the court below, Respondent argued that the defenses Petitioner contended were frivolous on their face were merely the same "standard, boiler-plate defenses used by experienced counsel in almost all federal and state litigation." [Respondent's "Brief of the Appellee," p. 8; see also id. at 16].

Are the district courts permitted to excuse the filing of frivolous papers so long as their frivolity relates to "standard boilerplate" claims, defenses, or arguments?

In the courts below Respondent's attorney argued that his conduct was not extra-

ordinary, that he has been practicing law for some thirteen years and that the propriety of his conduct has never been challenged until now. (The real problem, he suggested, is that Petitioner--who is not a practicing attorney--simply does not understand how the judicial system operates.)

What circumstances could possibly justify a district court's refusal to impose sanctions for such repeated violations of the Federal Rules? And would not an appropriate sanction take into account the number of violations, the nature of the violations, and the fact that Respondent was represented by experienced counsel?

When the Federal Rules of Civil Procedure were amended in 1983, it appeared that this Court itself had specified in the Rules the criteria to be applied in determining when sanctions are to be imposed. And those are the criteria being applied in the other Circuits. If the Rules do in

fact permit the district courts to refuse to impose sanctions when violations of the Rules have been established, as the Fifth Circuit has ruled, then Petitioner respectfully submits that this Court should specify what circumstances the district courts may properly take into account in deciding whether to impose sanctions, and therefore what criteria must be used by the appellate courts in reviewing such action by a district court. Otherwise, it would appear that the district courts in the Fifth Circuit have unfettered discretion.

III.

BECAUSE THE COURT OF APPEALS REFUSED TO CONSIDER PETITIONER'S CONTENTIONS CONCERNING VIOLATIONS OF 28 U.S.C. § 1927 AND LOCAL RULE C-10 (N.D. MISS.), IT WAS PLAIN ERROR TO AFFIRM THE DISTRICT COURT'S ADVERSE RULING ON THOSE ISSUES.

The court of appeals refused to review Petitioner's contentions with respect to violations of 28 U.S.C. § 1927 and Local Rule C-10 (N.D. Miss.). [A.6 at n.2].

Nevertheless, the court affirmed the district court's denial of sanctions under those provisions.

The Opinion of the court of appeals stated that since the district court apparently did not address Petitioner's contentions, then the Fifth Circuit would not do so either. It is a fact, however, that the district court denied Petitioner's motion for sanctions under those provisions (as well as under the Federal Rules), and it is a fact that the court of appeals affirmed the district court's Order denying sanctions on all grounds.

It is axiomatic that when a party fails to raise issues below those issues usually will not be considered on appeal. The Fifth Circuit appears to be extending that principle by deciding that if the district court fails to consider issues properly raised in that court, the appellate court will not review the district court's rul-

ing upon those issues.

A final Order entered by the district court is not rendered nonreviewable by the district court's failure to address the issues. At the very least, such a case would have to be remanded with instructions to address the issues so that the appellate court can review the lower court's ruling.

In this case, however, the district court's Order specifically stated that the court had considered Plaintiff's motion, Defendant's response, and Plaintiff's reply. The question to be considered on appeal was whether the district court's refusal to impose sanctions against Respondent's attorney under § 1927 (for having unreasonably and vexatiously multiplied and proliferated the proceedings) and against Respondent or his attorney, or both, under Local Rule C-10 (for having refused to stipulate for purposes of the

pretrial order matters which were not in good faith controverted) was an abuse of discretion under those provisions.

Petitioner's motion for sanctions relied solely on the written record to establish her contention that Respondent, by disregarding the requirements of the Federal Rules, managed to prolong for ten months a simple suit to domesticate a foreign judgment--a suit in which there were never any genuine issues of material fact (as the transcript of Respondent's trial testimony makes clear). The appellate court therefore would not have needed to remand the case even if the district court failed to consider Petitioner's contentions. The record itself shows that denial of sanctions in this case was, as a matter of law, an abuse of discretion.

What the Fifth Circuit has decided, in effect, is that when a district court arbitrarily denies a motion for sanctions,

without considering the issues, the district court's ruling will not be reviewed by the court of appeals but will automatically be affirmed. That decision is patently erroneous, and petitioner respectfully submits that this Court, in the exercise of its supervisory powers, should not permit it to stand.

CONCLUSION

For the reasons set forth above, Petitioner prays that the Writ of Certiorari issue to review the decision of the Fifth Circuit in this case, and respectfully suggests that summary reversal would be appropriate.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4321

(District Court Docket No. EC85-193-GD-D)

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

[Submitted on Briefs]

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

OPINION OF THE COURT

[Filed September 17, 1986]

JOHNSON, Circuit Judge:*

Plaintiff Mildred Bailey Bell appeals

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

from the district court's denial of her postjudgment motion for sanctions. We affirm the district court's denial of the motion.

I. FACTS AND PROCEDURAL HISTORY

The facts and the procedural history in this case are set forth in our opinion concerning plaintiff Bell's appeal no. 86-4196 from the judgment of the district court.

After judgment had been rendered, plaintiff Bell moved the district court to impose sanctions upon both the defendant, John Thomas Bell, Jr., and his attorney. The district court denied the motion:

> After reviewing the plaintiff's postjudgment motion for sanctions, the defendant's response thereto, and the plaintiff's reply, the court is of the opinion that while each party herein is far from being a model litigant, the award of sanctions is not appropriate for either party. The court finds that the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules.

Bell v. Bell, No. EC 85-193-GD-D. Plain-

tiff Bell now separately appeals from the district court's denial of her postjudgment motion for sanctions.

II. DISCUSSION

Assignments of Error

On appeal, plaintiff Bell argues that the district court erred in refusing to impose sanctions under Federal Rule of Civil Procedure ("Federal Rule") 11 for the following asserted violations of that rule (as described by plaintiff):

1. Defendant Bell's Response to Motion for Judgment on the Pleadings and Motion for Order to Show Cause asserted that plaintiff was relying "upon affidavits and copies of pleadings in other litigation, all of which are attached to the motion." In fact, plaintiff had attached only one affidavit, which made references to the agreement incorporated by the Georgia decree.

2. The same Response miscited (and at-

tached copies of) Georgia cases in support of an argument that plaintiff was seeking to enforce a judgment lacking finality.

3. Defendant's requests for time extensions--three of four were granted--were made solely to harass, delay, or increase litigation costs. One of the requests asserted that both parties intended to file a consent to trial by magistrate when this was not the case.

4. Defendant's Answer falsely denied arrearage in payments under the Georgia decree and frivolously asserted defenses of failure to state a claim and lack of jurisdiction.[1]

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[1]Plaintiff further argues that defendant's Memorandum in Opposition to Plaintiff's Post-Judgment Motion for Sanctions violated Federal Rule 11. This asserted violation was not presented to the district court. Plaintiff did, in her Reply in the district court to defendant's Memorandum, state that this Memorandum was "scurrilous" and "patently false" in certain respects and that "Defendant's attorney should be reprimanded." Nevertheless, we are uncertain whether the district court considered this asserted violation when

Plaintiff also asserts error in the district court's refusal to impose sanctions under Federal Rule 37(c) for defendant's failure to make certain requested admissions. Instead, he asserted that he lacked knowledge, that plaintiff already knew the answer, and that the same admis-

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denying sanctions. Accordingly, we decline to consider it in reviewing the denial of sanctions.

Plaintiff also suggests that attorney certification of certain discovery responses violated Federal Rule 11. The sanction provision of Rule 11 by its terms applies to every "pleading, motion, or other paper" signed in violation of the rule. Nevertheless, a note to the rule advises: "Although the encompassing reference to 'other papers' in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11." See also In re Yagman, Nos. 84-5839, 84-5957, n.25 & accompanying text (9th Cir. Aug. 13, 1986) (available Sept. 5, 1986, on WESTLAW; to be reported at 796 F.2d 1165); see Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) (Rule 11 is not "properly used to sanction the inappropriate filing of papers where other rules more directly apply. For example, excessive discovery requests should be dealt with under Rule 26(g) rather than Rule 11 . . . .") Accordingly, we take up the asserted certification violations in discovery responses in our consideration infra of Federal Rule 26(g).

sion had already been made in previous litigation between the parties.

Finally, plaintiff argues district court error in declining to apply sanctions under Federal Rule 26(g) for interrogatory responses that failed to provide certain information on the ground that it had been supplied in previous litigation between the parties.[2]

Analysis

Plaintiff argues that, once a violation has been established, Federal Rule 11, as amended in 1983, deprives the district court of all discretion in deciding whether to impose an appropriate sanction. The rule's mandatory language certainly suggests this interpretation: "If a

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[2]Plaintiff also contends that sanctions should be imposed under N.D. Miss. Rule C-10 and 28 U.S.C. § 1927. Apparently, the district court did not address these contentions. See supra at p. 2 text of district court order denying sanctions. Accordingly, we decline to review them.

pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." Fed. R. Civ. P. 11 (emphasis supplied).[3] Nevertheless, the district court clearly retains discretion to determine what is an "appropriate sanction" under the circumstances. Id.[4]

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[3] See Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986) ("Rule 11 expressly mandates the imposition of sanctions once a violation is found"); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985) ("Unlike the statutory provisions that vest the district court with 'discretion' to award fees, Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions.").

[4] "Under Rule 11, the district court 'has discretion to tailor sanctions to the particular facts of the case, with which it should be familiar.'" Davis v. Veslan Enters., 765 F.2d 494, 501 (5th Cir. 1985) (quoting Fed. R. Civ. P. 11 advisory committee note); see also Albright, 788 F.2d at 1222 ("'The selection of the type of sanction to be imposed lies of course within the district court's sound exercise of discretion.'" (quoting

Analysis of the similar language of Federal Rule 26(g) suggests similar conclusions. After providing that every request for discovery or response or objection thereto shall be signed and that the signature of the attorney or party constitutes a certification as to certain listed matters, the rule provides, "If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction . . . ." Fed. R. Civ. P. 26(g) (emphasis supplied). A note to the rule explains: The "rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the

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Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985)); Eastway Constr. Corp., 762 F.2d at 254 n.7 ("the district courts retain broad discretion in fashioning sanctions").

first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances." Id. advisory committee note.[5]

Federal Rule 37(c) contains similarly mandatory language. If a party has failed to make a requested admission as to a matter later proven to be true then the rule permits the requesting party to apply to the court for an order requiring the first party to pay him the reasonable expenses incurred in making that proof. The rule further provides:

> The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial im-

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[5] See In re MacMeekin, 722 F.2d 32, 35 (3d Cir. 1983) ("The recent amendments to the Rules of Civil Procedure," including Rules 11 & 26(g), "emphasize the obligation of trial judges to consider an award of expenses and attorney's fees when violations of the rules occur.").

> portance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c) (emphasis supplied). This Court, speaking of Rule 37(c), has stated that "if certain requirements are not met the court shall impose sanctions upon application or motion." **Dorey v. Dorey**, 609 F.2d 1128, 1135 (5th Cir. 1980) (emphasis in original).[6] The **Dorey** court further acknowledged, however, that the "district court has broad, although not unbridled, discretion in imposing sanctions . . . under Rule 37." Id.[7]

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[6] See 8 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 2290, at 804 (1970) ("The court is required to make the award of expenses and fees to a party who comes within Rule 37(c) unless it finds that one of four specified conditions exists." (Footnote omitted).

[7] Chemical Eng'g Corp. v. Essef Indus., Inc., 795 F.2d 1565, 1575 (Fed. Cir. 1986) (applying abuse of discretion standard of review to district court grant of Rule 37(c) sanctions); Williams

The district court in the present case stated that "the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules." We understand the district court to have concluded that, although there may have been violations of the rules, the appropriate sanction under the circumstances of this case was no sanction. We are not

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v. State Farm Mut. Auto. Ins. Co., 737 F.2d 741, 746 (8th Cir. 1984) (applying abuse of discretion standard of review to district court denial of Rule 37(c) sanctions), cert. denied, ___ U.S. ___, 105 S. Ct. 910 (1985); White Consol. Indus., Inc. v. Vega Servo-Control, Inc., 713 F.2d 788, 792 (Fed. Cir. 1983) (same).

We note that a similar conclusion would likely result if plaintiff's contentions based on N.D. Miss. Rule C-10 and 28 U.S.C. § 1927 were properly before us. See supra note 2. The rule provides that a violation of the rule "may result in the imposition of appropriate sanctions." N.D. Miss. Rule C-10(b) (emphasis supplied). Also, we have applied an abuse of discretion standard of review in § 1927 cases. Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989, 992 (5th Cir. 1986); In re Ginther, 791 F.2d 1151, 1155 (5th Cir. 1986); Warren v. Reserve Fund, Inc., 728 F.2d 741, 748 (5th Cir. 1984).

constrained to say that the district court must, upon the establishment of a violation of the rules at issue here, impose some sort of sanction however nominal.[8] We have examined plaintiff's contentions and the record in this case and "are not left with a '"definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors."'" **Dorey**, 609 F.2d at 1135-36 (quoting **Wilson v. Volkswagen of America, Inc.**, 561 F.2d 494, 506 (4th Cir. 1977)). Accordingly, plaintiff has failed to show any abuse of discretion in the district court's conclusion that no sanction was the appropriate sanction.

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[8] Contra Westmoreland, 770 F.2d at 1174-75 ("once the court finds that . . . factors [showing breach of Rule 11] exist, Rule 11 requires that sanctions of some sort be imposed" (emphasis in original)).

III. Conclusion

For the reasons stated, we affirm the district court's denial of plaintiff's postjudgment motion for sanctions.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MILDRED BAILEY BELL

Plaintiff

V

Civil Action No.
EC 85-193-GD-D

JOHN THOMAS BELL, JR.

Defendant

ORDER DENYING SANCTIONS

[Filed April 15, 1986]

After reviewing the plaintiff's post-judgment motion for sanctions, the defendant's response thereto, and the plaintiff's reply, the court is of the opinion that while each party herein is far from being a model litigant, the award of sanctions is not appropriate for either party. The court finds that the parties' conduct in the case sub judice did not amount to the type of unreasonable conduct that should be punished pursuant to the Federal Rules.

Accordingly, it is **Ordered** that the plaintiff's motion for sanctions and the defendant's motion for sanctions should be and are hereby denied.

THIS 14th day of April, 1986.

Glen H. Davidson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4321
Summary Calendar

D.C. Docket No. EC85-193-GD-D

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JUDGMENT

[Sept. 17, 1986; Mandate Issued Oct. 27, 1986]

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 17, 1986

ISSUED AS MANDATE: Oct. 27, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4321

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC
[Filed Oct. 17, 1986]
[Opinion filed Sept. 17, 1986]

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Sam Johnson
United States Circuit Judge
10/14/86